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Abdul Rahim a/l Abdul Razak v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO M-05–97–04 OF 2013
LINTON ALBERT, MOHAMAD ARIFF AND ZAKARIA SAM JJCA
13 JANUARY 2015

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Evidence — Conflicting testimony — Conflicting evidence of eyewitness — Testimony of eyewitness during cross-examination contradicted/inconsistent with what he had said during examination-in-chief — Whether court left without trustworthy evidence upon which it could convict — Whether other independent evidence did not directly and irresistibly link accused to commission of murder — Whether trial judge should have acquitted and discharged accused at end of prosecution's case — Whether trial court erred in failing to find accused had raised reasonable doubt in prosecution's case — Whether trial court wrong to have convicted after ruling evidence of prosecution more believable than evidence of accused

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The appellant was sentenced to death by the High Court after he was found guilty of murdering an Indian national ('the deceased'). The decomposed body of the deceased was found floating in a disused pond behind the appellant's rented house where the murder allegedly took place. Except for the evidence of an alleged eyewitness, SP6, the prosecution's remaining evidence was

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circumstantial and included the recovery of the alleged murder weapons, an axe and a knife, from a well near the crime scene as well as DNA evidence and statements (P68, P72 and P81) recorded from three Indian nationals under s 112 of the Criminal Procedure Code. The statements were admitted into evidence under s 32 of the Evidence Act 1950 to show the motive for the

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murder as the prosecution could not locate the three persons to testify at the trial. In his examination-in-chief, SP6 claimed that when he met the appellant the day before the deceased's death, the appellant told him he wanted to beat the deceased up for causing him (the appellant) to be evicted from a toddy shop where he had been staying; that the following day when SP6 joined the

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appellant and the deceased for alcoholic drinks at the former's house he saw the appellant hit the deceased several times on the head with an axe before stabbing the deceased in the neck with a knife. SP6 said that because threatened to harm SP6's daughter if he did not co-operate, SP6 was compelled to help the appellant throw the deceased's body into a pond behind the house and then to

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clean the area of blood stains. SP6 said after the deed was done, the appellant gave him RM100 and the deceased's handphone. However, when SP6 was cross-examined at the adjourned hearing of the trial about a year after his examination-in-chief, his testimony differed substantially and he often said he 'could not remember' or 'did not know' in reply to several material questions

that were put to him. Despite this, the trial judge found SP6 to be truthful and credible and ruled that the discrepancies and inconsistencies in his testimony was probably due to the fact SP6 was pre-occupied with the ill-health of his wife and child at the time of the cross-examination. In any event, the trial judge held there was sufficient independent evidence, such as the DNA evidence, the discovery of the alleged murder weapons and P68, P72 and P81, which corroborated SP6's testimony. The trial judge found the appellant's defence (that it was SP6 who had killed the deceased because of a 'problem' between them) incapable of belief and held it was a mere denial and an afterthought. The appellant appealed against conviction and sentence.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) Given the gravity of the offence and the death sentence, the paramount issue was whether there was proper judicial evaluation of the evidence by the trial judge in a situation where the only direct evidence was the testimony of SP6 who proved to be inconsistent and, in fact, contradicted himself on the fundamental aspects of the evidence linking the appellant to the crime. SP6 could not even confirm during cross-examination whether he was with the appellant and the deceased on the date of the incident (see para 55).

(2) This court could not agree with the trial judge's explaining away of SP6's contradictions and inconsistencies by referring to his then state of mind (being pre-occupied with the health of his wife and child) and the lapse of about a year between his examination-in-chief and his cross-examination. It was highly improbable, and it defied logic, that SP6 could have completely forgotten the gruesome events he had narrated in his examination-in-chief even though a year had lapsed and even though he was under some mental strain worrying about the health of his wife and child (see para 56).

(3) The trial judge was swayed by the corroborative evidence but they did not directly and irresistibly link the evidence to the appellant. The post-mortem did not irresistibly prove the appellant caused the fatal injuries; the DNA evidence, likewise, did not show the appellant was a contributory. The discovery of the alleged murder weapons could not be regarded on its own as irresistibly proving they were used by the appellant to murder the deceased. It was not coupled with any admissible evidence of a confession to the killing. The s 112 statements, providing motive for the murder, were weak evidence and quite apart from their being hearsay, the appellant was denied the opportunity to test the veracity of those statements by cross-examining their makers. The trial judge failed to direct his mind to the weight to be attached to this particular

unsatisfactory evidence. This failure, by itself, led to a miscarriage of justice which rendered the conviction unsafe (see paras 57–59 & 63).

(4) The trial judge should have acquitted and discharged the appellant at the close of the prosecution's case since on maximum evaluation of the evidence no prima facie case was established. He failed to assess SP6's credibility on maximum evaluation basis. As for the decision at the end of the trial, there was serious misdirection when the trial judge's decision was essentially based on the issue of the believability of the appellant's evidence as against the prosecution's evidence. The law on this was well-established: it was not a question of whether or not a trial judge believed the story of an accused was truthful, but whether, at the end of the trial, the accused had raised a reasonable doubt in the prosecution's case. The trial court should have accepted the existence of a reasonable doubt in the accused's favour where a prosecution witness had led two sets of evidence which were contradictory with each other on a fundamental matter; the inevitable conclusion in such a case being the court was left with no trustworthy evidence upon which it could base a conviction (see paras 60–62).

(5) The failure of the appellant's counsel to put a direct question to SP6 that he (SP6) killed the deceased was just a factor to be considered and was not a determinative one in a criminal trial where the ultimate question was whether a reasonable doubt had been created in the prosecution's case. In any event, the question was put directly through another witness ie SP22 (see para 62).

[Bahasa Malaysia summary

Perayu dijatuhkan hukuman mati oleh Mahkamah Tinggi selepas dia didapati bersalah membunuh seorang warganegara India ('si mati'). Mayat si mati yang telah reput ditemui terapung di kolam yang tidak digunakan di belakang rumah sewa perayu di mana pembunuhan tersebut dikatakan berlaku. Kecuali dakwaan keterangan saksi mata, SP6, keterangan pendakwaan yang selebihnya adalah mengikut keadaan dan termasuk penemuan senjata-senjata pembunuhan, kapak dan sebilah pisau, di perigi berdekatan dengan tempat kejadian serta keterangan DNA dan kenyataan (P68, P72 dan P81) yang direkodkan daripada tiga orang warganegara India di bawah s 112 Kanun Tatacara Jenayah. Kenyataan-kenyataan tersebut diterima masuk sebagai keterangan di bawah s 32 Akta Keterangan 1950 untuk menunjukkan motif bagi pembunuhan kerana pihak pendakwaan tidak dapat mencari tiga orang lagi untuk memberi keterangan semasa perbicaraan. Dalam pemeriksaan utama, SP6 mendakwa bahawa semasa dia berjumpa dengan perayu sehari sebelum kematian si mati, perayu telah memberitahunya bahawa dia ingin memukul si mati kerana menyebabkan dia (perayu) dihalau daripada kedai todi yang dihuninya; bahawa hari seterusnya, semasa SP6 menyertai perayu dan si mati untuk minuman beralkohol di rumah perayu, dia melihat perayu

memukul si mati beberapa kali di bahagian kepala dengan kapak sebelum menikam si mati dengan pisau di bahagian leher. SP6 menyatakan bahawa kerana diugut untuk mencederakan anak perempuan si mati jika tidak bekerjasama, SP6 terpaksa membantu perayu membuang mayat si mati ke dalam kolam di belakang rumah dan membersihkan kawasan yang mempunyai kesan dadah. SP6 menyatakan bahawa selepas tugas tersebut telah dilakukan, perayu memberikan RM100 dan telefon bimbit si mati. Walau bagaimanapun, semasa SP6 disoal balas di perbicaraan yang ditangguhkan kira-kira setahun selepas pemeriksaan utamanya, keterangannya berbeza sama sekali dan dia sering mengatakan bahawa dia tidak ingat atau tidak tahu sebagai balasan kepada beberapa soalan-soalan material yang diajukan kepadanya. Walau bagaimanapun, hakim perbicaraan mendapati bawah SP6 bercakap benar dan kredibel dan memutuskan bahawa kepincangan dan percanggahan dalam keterangannya berkemungkinan kerana fakta bahawa SP6 sibuk dengan keuzuran isteri dan anaknya semasa pemeriksaan balas. Dalam apa jua keadaan, hakim perbicaraan memutuskan bahawa terdapat keterangan bebas yang mencukupi, seperti keterangan DNA, penemuan beberapa senjata pembunuhan dan P68, P72 dan P81 yang menyokong keterangan SP6. Hakim perbicaraan memutuskan bahawa pembelaan perayu (bahawa SP6 yang membunuh SP6 kerana 'masalah' antara mereka) sukar dipercayai dan merupakan penafian semata-mata serta sesuatu yang difikirkan kemudian. Perayu merayu terhadap sabitan dan hukuman.

Diputuskan, membenarkan rayuan, mengenepikan sabitan dan hukuman dan melepaskan dan membebaskan perayu:

(1) Melihat pada keseriusan kesalahan hukuman mati, isu utama adalah sama ada pertimbangan penghakiman yang sewajarnya terhadap keterangan telah diberikan oleh hakim perbicaraan dalam situasi yang mana hanya keterangan langsung adalah keterangan SP6 yang jelas bercanggah dan, malahan bercanggah dengan dirinya sendiri berkenaan aspek-aspek keterangan yang mengaitkan perayu dengan jenayah tersebut. SP6 tidak dapat mengesahkan semasa pemeriksaan balas sama ada dia ada bersama-sama dengan perayu dan si mati semasa tarikh kejadian tersebut (lihat perenggan 55).

(2) Mahkamah ini tidak bersetuju dengan penjelasan hakim perbicaraan mengenai percanggahan dan kepincangan SP6 dengan merujuk keadaan mindanya (sibuk dengan kesihatan isteri dan anaknya) dan jarak setahun antara pemeriksaan utama dan pemeriksaan balas. Adalah tidak mungkin dan bercanggah dengan logik bahawa SP6 boleh terlupa sama sekali mengenai kejadian mengerikan yang diperihalkan olehnya dalam pemeriksaan utama walaupun terdapat jarak satu tahun dan walaupun mindanya tertekan kerana risaukan anak serta isterinya (lihat perenggan 56).

(3) Hakim perbicaraan terpengaruh dengan keterangan sokongan tetapi kesemuanya tidak mengarahkan dan tidak menentang daripada mengaitkan keterangan dengan perayu. Bedah siasat tidak membuktikan bahawa perayu telah menyebabkan kecederaan-kecederaan yang boleh menyebabkan kematian; keterangan DNA, begitu juga, tidak menunjukkan bahawa perayu menyumbang kepadanya. Penemuan senjata-senjata pembunuhan tidak boleh secara sendirinya dianggap membuktikan bahawa kesemuanya digunakan oleh perayu untuk membunuh si mati. Ia tidak disertai dengan keterangan pengakuan pembunuhan yang boleh diterima masuk. Kenyataan s 112 yang mana memperuntukkan motif bagi pembunuhan, adalah keterangan lemah dan berbeza daripada menjadi dengar cakap, perayu dinafikan daripada peluang untuk menguji kebenaran kenyataan-kenyataan tersebut dengan memeriksa balas pembuat-pembuatnya. Hakim perbicaraan juga gagal mengarahkan mindanya kepada berat keterangan yang tidak memuaskan. Kegagalan ini, dengan sendirinya, menyebabkan kegagalan keadilan yang menjadikan sabitan tidak selamat (lihat perenggan 57–59 & 63).

(4) Hakim perbicaraan sepatutnya melepaskan dan membebaskan perayu di penutup kes pendakwaan kerana atas pertimbangan maksima keterangan, tiada kes prima facie yang telah terbukti. Beliau gagal mempertimbangkan kredibiliti SP6 atas dasar pertimbangan maksima. Bagi keputusan di penutup perbicaraan, terdapat salah arahan apabila keputusan hakim perbicaraan adalah secara besarnya berdasarkan isu kebolehpercayaan keterangan perayu berbanding keterangan pihak pendakwaan. Undang-undang mengenai ini adalah mantap: ia bukanlah persoalan sama ada atau tidak hakim perbicaraan mempercayai cerita tertuduh adalah benar tetapi sama ada di penutup kes perbicaraan, tertuduh telah membangkitkan keraguan munasabah terhadap kes pendakwaan. Mahkamah bicara sepatutnya menerima kewujudan keraguan munasabah berpihak kepada tertuduh di mana saksi pendakwaan telah mengemukakan dua set keterangan yang bercanggah dengan satu sama lain mengenai hal perkara yang penting; kesimpulan yang tidak boleh dielakkan dalam kes sebegini adalah mahkamah tidak mempunyai keterangan yang boleh dipercayai untuk disandarkan bagi sabitan (lihat perenggan 60–62).

(5) Kegagalan peguam perayu mengajukan soalan kepada SP6 bahawa dia (SP6) membunuh si mati adalah faktor yang perlu dipertimbangkan dan bukan sebagai penentu dalam perbicaraan jenayah di mana soalan utama adalah sama keraguan munasabah telah dibangkitkan dalam kes pendakwaan. Dalam apa jua keadaan, soalan tersebut diajukan terhadap saksi lain iaitu SP22 (lihat perenggan 62).]

Notes

For a case on conflicting evidence of eyewitness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 1068.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chu Tak Fai v PP [1998] 4 MLJ 246, CA (refd)
Harcharan Singh & Anor v PP [2005] 1 MLJ 593; [2005] 1 CLJ 11, CA (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Rajandiran a/l Kadirveil [2002] 7 MLJ 77, HC (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183, SC (refd)

Legislation referred to

Criminal Procedure Code ss 13, 112, 180, 180(3)
Evidence Act 1950 ss 27, 32, 32(1)(i)
Penal Code ss 94, 300(c), 302

Appeal from: Criminal Trial No 45B-5 of 2011 (High Court, Melaka)

Afifudin bin Ahmad Hafifi (Salehuddin Saidin & Assoc) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamad Ariff JCA:

[1] The appellant was charged and convicted of murder under s 302 of the Penal Code and sentenced to death by hanging. The charge read:

> Bahawa kamu pada 26hb September 2010 jam lebih kurang 7.30 petang, di rumah tidak bernombor kuarters lama Keretapi Tanah Melayu (KTM), Jalan Kampung Orang Asli, Kubang Badak, Tebong di dalam daerah Alor Gajah dalam Negeri Melaka telah melakukan kesalahan membunuh dengan menyebabkan kematian terhadap seorang lelaki Mohanasundaram a/l Kaliyappan, Passport No. H4414305, seorang warga negara India dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] After considering the entirety of the appeal record, the grounds of appeal and the submissions of counsel on the facts and the law, we found the conviction and sentence handed down by the High Court was unsafe and a miscarriage of justice had been occasioned which justified a reversal of the verdict and sentence. The appeal was thus allowed and we set aside the conviction and sentence. We now provide the full reasons for the reversal of the High Court decision.

THE FACTS

[3] The decomposing body of the deceased was discovered floating in a disused pond behind an area described as the old KTM quarters in the morning of 1 October 2010 by a grass cutter, 'SP5'. The identity of the body was confirmed by SP18, a friend of the deceased. The post-mortem conducted on 5 October 2010 by SP17 (Dr Azaini bin Ibrahim, the pathologist) concluded the cause of death as 'sharp object injury to the neck and hands' and 'blunt force trauma to the head'.

[4] The prosecution called 22 witnesses, including one alleged eyewitness, 'SP6' (Jaya Kumar a/l Krishnan). SP6 was the prosecution's main witness who testified to have known the deceased by the name 'Mappilai' for over a year. SP6 also testified to have been a friend of the appellant who he had known for over ten years.

[5] Aside from SP6's evidence, there were no other eyewitnesses to the events which led to the alleged murder of 'Mappilai' by the appellant. Thus, the case before the High Court proceeded mainly on the direct evidence of SP6, with the remaining evidence being essentially circumstantial evidence.

[6] The alleged murder weapons, an axe (P30) and a knife (P31), were discovered in a well located in front of the appellant's rented house and the alleged scene of the crime (the old KTM quarters). These were received and admitted as evidence under s 27 of the Evidence Act 1950('the EA'). The High Court found a prima facie case made out at the end of the prosecution case and called upon the appellant to enter on his defence under s 180(3) of the Criminal Procedure Code ('the CPC').

[7] The appellant elected to give his evidence on oath. There was no other witness called for the defence.

[8] The High Court, at the conclusion of the trial, found the prosecution had proven its case against the appellant/accused beyond reasonable doubt and thereby found him guilty as charged, and sentenced the appellant to the mandatory penalty of death by hanging.

THE PROSECUTION'S CASE

[9] As noted earlier, the prosecution's case relied substantially on the direct evidence of SP6, who claimed in his narration of events, to have been invited by the appellant a day before the death of the deceased (25 September 2010) to drink liquor at the accused's house in the evening of that date, ie about 7.30pm. On that evening, the appellant had told SP6 that the appellant had been

scolded by 'Misai', the father-in-law of the deceased, because the water and electricity charges at the toddy shop where the appellant was then working, and which was operated by Misai, had increased. It appeared that when Misai went back to India, an area dug out for a fish pond had been filled with water without Misai's consent, and the appellant had subscribed to Astro TV which he used in the premises of the toddy shop. According to SP6, the appellant had told him he intended to beat up the deceased since it was the deceased who had complained to Misai. SP6 was of the impression that the appellant was joking, but nevertheless advised him not to do so since the deceased had a family and children.

Examination-in-chief of SP6

[10] The examination-in-chief of SP6 ran as follows:

> Pada 25.9.2010 saya pergi kerja. Dalam perjalanan OKT tahan saya dan tanya saya pergi ke mana. Saya jawab saya dalam perjalanan untuk bekerja. Selepas itu OKT ajak saya minum pukul 7.30 malam.
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> Pada pukul 7.30 malam saya pergi ke tempat OKT di rumah KTM tersebut. Sampai di sana kami minum, semasa minum OKT beritahu bahawa Misai telah marah saya (OKT) sebab duit api dan air. Lepas itu OKT beritahu dia hendak pukul Mapillai (si mati). Saya beranggapan bahawa dia cuma bergurau dan menasihatinya jangan apa-apa Mapillai sebab Mapillai ada isteri dan anak-anak. Selepas habis minum lebih kurang 10.00 malam saya pulang ke rumah.
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> S: OKT marahkan Misai kenapa pula dia hendak pukul Mapillai? J: Sebab Mapillai yang beritahu Misai duit api dan air sudah tinggi. Sebab OKT dihalau dan dia dendam.
>
> Saya tidak tahu bila OKT dihalau. Semasa OKT beritahu hendak pukul Mapillai saya tidak beritahu Mapillai sebab anggap OKT bergurau sahaja. OKT tidak pernah cakap begini kepada saya sebelum ini (pp 26–27, appeal record, Vol 1).

[11] Thus, by this testimony the appellant was vengeful against the deceased since it was the deceased who had complained to Misai, and because of that the appellant had been asked to leave the toddy shop where he was then staying.

[12] SP6 did not see the need to inform the deceased about the appellant's intention to harm him because SP6 thought the appellant was joking ('bergurau').

[13] SP6 then narrated the events on 26 September 2010, when he was again invited to have alcoholic drinks with the appellant at the appellant's house. SP6 described how the deceased was already present when he arrived at around 7.30pm, and how they all started drinking together. The appellant turned up the TV volume and informed them he was going to get some fried chicken, but

instead returned with an axe with which he beat the deceased four times on the head. SP6 saw the appellant holding the axe, tried to run out of the house but the front door was locked. The appellant threatened SP6 that if he fled he (the appellant) would inform the police that SP6 did it. The appellant then retrieved a knife from a double-decker bed and stabbed the deceased thrice on his neck. The appellant dragged the deceased's body to the kitchen area near the stone steps and hit both of the deceased's hands with the axe. The appellant forced SP6 to lift the body and together with the appellant they threw the body into the pond behind the house. According to SP6, he was forced to assist, for the appellant had threatened to cause harm to SP6's daughter if he did not. The appellant then forced SP6 to fetch water from the well in front of the house, and the appellant used the water to clean up the traces of blood using some cloth and SP6's shirt in the process. The cloth and the shirt were placed by SP6 in a plastic bag thrown by SP6 into a drain beside the KTM railway track. After disposing the items, SP6 changed into a fresh pair of clothes that he had brought along with him, and returned to the appellant's house. At that point the appellant gave SP6 RM100 and the deceased's hand phone. SP6 then went home.

[14] The narration is best explained in SP6's own words (in examination-in-chief) as follows:

> Pada 26.9.2010 kes bunuh ini berlaku. Pada tarikh itu lebih kurang 7.00 pagi dalam perjalanan ke tempat kerja OKT tahan saya. Dia ajak saya minum pada pukul 3.00 petang. Pada pukul 5.00 petang saya pulang dari tempat kerja. Saya sampai di rumah lebih kurang 5.00 petang saya mandi dan makan. Lepas itu lebih kurang 6.30 petang saya keluar ke kedai untuk beli barang sebab isteri suruh.
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> Saya minum Carlsberg di kedai. Selepas minum saya pulang ke rumah. Dalam perjalanan pulang OKT tahan saya, ajak saya minum. Masa itu lebih kurang 7.30 petang. Saya balik ke rumah saya dahulu. Lepas itu saya pergi ke rumah OKT. Bila saya pergi Mapillai ada di sana, kami semua minum.
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> Semasa kami minum OKT pergi ON TV dengan volume yang tinggi. Semasa itu OKT beritahu hendak ambil daging ayam. OKT pergi ke depan, saya dan Mapillai bersembang sambil tengok TV. Masa kami sedang bersembang tiba-tiba OKT datang dengan kapak pukul di kepala Mapillai. Selepas dipukul saya toleh dan pandang belakang. OKT datang dari belakang. Saya nampak kapak dipegang oleh OKT. Saya pun lari keluar rumah. Saya nak lari ke pintu depan tapi tidak dapat sebab pintu kunci.
>
> Saya lihat OKT pukul Mapillai di kepala sebanyak 4 kali. OKT kata kalau awak lari saya beritahu polis awak yang melakukan segalanya.
>
> OKT ambil pisau dari double decker bed dan tikam Mapillai di leher sebanyak 3 kali. Masa itu Mapillai sudah terjatuh di lantai kemudian OKT tarik Mapillai dekat tangga batu di dapur dan dia terbalikkan kapak dan dia pukul di kedua-dua tangan Mapillai. Selepas pukul Mapillai sudah mati.

OKT paksa saya untuk angkat mayat tersebut. Dia kata kalau saya tidak angkat mayat itu 'saya akan apa-apakan anak perempuan awak yang selalu jalan di sini'. Saya pun takut dan angkat mayat itu.

Ada satu kolam di belakang rumah. OKT suruh campakkan mayat dalam kolam itu. Selepas campak kami masuk dalam rumah. OKT paksa saya ambil air di perigi. OKT guna air untuk bersihkan kesan darah.

OKT suruh saya ambil kain-kain dan baju saya untuk lapkan darah-darah. Kemudian masukkan kain-kain termasuk baju saya dalam plastik dan saya buang di satu longkang di tepi landasan KTM.

Saya selalu bawa sepasang pakaian untuk pergi kerja. Selepas saya buang pakaian saya, saya pakai pakaian yang saya bawa. Selepas buang saya pergi ke rumah OKT dan dia beri RM100.00 dan satu telefon bimbit. Selepas itu saya pulang ke rumah. Perkara ini berlaku pada jam 8.00 malam lebih.

Pada pukul 3.00 petang saya tidak pergi minum dengan OKT. Saya minum Carlsberg 1 tin sahaja. Semasa OKT tahan saya 7.30 malam dia tidak beritahu saya Mapillai akan minum bersama ...

Sebelum 26.10.2010 saya pernah nampak OKT minum dengan si mati di kedai todi. Saya tidak ingat berapa haribulan. Keesokan harinya saya jumpa OKT semasa hendak pergi kerja. OKT beritahu 'jangan beritahu perkara ini kepada sesiapa pun'. Lepas itu saya dengan urusan saya dan dia dengan urusan dia.

Saya tidak beritahu sesiapa keesokan harinya kerana saya takut ia akan apa-apakan anak atau keluarga saya. Saya juga tidak buat repot atas ugutan OKT sebab takut apa-apa akan berlaku terhadap anak perempuan saya (pp 27–31, appeal record, Vol 1).

[15] From SP6's evidence, it was evident that this witness did not make any report on the murder nor informed anyone of it, since he was afraid of the harm that could befall his daughter if he did. As he explained it: 'Lepas itu saya dengan urusan saya dan dia dengan urusan dia'.

[16] SP6 was arrested by the police on 6 October 2010 at an unnumbered house, Perkampungan Orang Asli Tebung. The police also seized a t-shirt and trousers belonging to him. See the evidence of SP8 (ASP Mohd Zulkifli bin Yusof, the investigating officer) at pp 108–109, appeal record, Vol 1).

[17] The appellant was arrested on 7 October 2010 at IPD, Alor Gajah where he was brought after having been arrested earlier on a charge of housebreaking (see appeal record, Vol 1, p 110).

SP6's cross-examination

[18] SP6 was subjected to vigorous cross-examination by counsel for the accused/appellant during the trial during which his answers were either uncertain or contradictory. Again, it is best to quote SP6's actual answers for a proper assessment to be made. The relevant parts read:

Q: Setuju, saya cadangkan oleh kerana dah kenal 10 tahun lebih dan minum bersama, dia (the appellant) ialah kawan baik kamu?

A: Ya.

Q: Adakah Rahim kenal isteri dan anak-anak kamu?

A: Kenal.

Q: Adakah pernah bawa keluarga kamu ke rumah dia atau dia datang ke rumah kamu?

A: Saya tidak pernah ke rumahnya tetapi masa saya bawa mereka ke kedai, Rahim pernah jumpa. Banyak kali. Rahim ada jumpa keluarga saya, dalam keadaan itu.

Q: Macam mana hubungan dia dengan keluarga awak?

A: Mesra.

Q: Pada 25.9.2010, kamu bekerja di mana ?

A: Di estet.

Q: Dalam pemeriksaan utama, awak ditahan oleh Rahim, bila dia tahan awak?

A: *Ya. Bila, tidak ingat.*

Q: Apa tujuan Rahim tahan kamu?

A: *Tidak ingat.*

Q: Sekarang, awak tidak ingat dia, perkara itu, kamu ingat, awak ditahan oleh Rahim?

A: Dah lama tidak ingat Sama ada saya ditahan oleh Rahim pada hari 25.9.2010.

Q: Pada malam 25.9.2010, lebih kurang 7.30 malam, adakah awak minum pada hari itu?

A: *Tidak tahu. Saya tidak ingat sama ada saya ada minum.*

Q: Cadangkan pada 25.9.2010, kamu dan Rahim ada bersama-sama minum pada hari itu?

A: Saya tidak ingat.

Q: *Pada 26.9.2010, awak dimana?*

A: *Saya tidak tahu.*

Q: Awak ada pergi kerja pada hari itu?

A: *Saya tidak tahu.*

Q: Ikut keterangan dulu, kamu ada keluar selepas mandi untuk beli beras pada 26.9.2010?

A: Ya.

Q: Pada hari itu, awak minum Carlsberg di kedai hendak beli beras itu?

A: Ya.

Q: *Adakah kamu pergi ke rumah Rahim malam 26.9.2010?*

A: *Tidak ingat.*

Q: Pada malam itu, ada jumpa Mapillai?

A: Ada. Jumpa di kedai di Tebung.

Q: Pukul berapa masa itu?

A: Tidak tahu.

Q: Adakah kamu bercakap atau jumpa saja?

A: Tidak cakap.

Q: *Pada malam 26.9.2010, lepas di kedai dan minum Carlsberg awak di mana?*

A: *Saya pulang ke rumah. Saya pulang ke rumah isteri saya di Kampung Asahan, masa tidak ingat.*

Q: *Selepas balik ke rumah, ada keluar ke mana atau terus tidur?*

A: *Sebab saya mamai, saya terus tidur.*

Q: *Tidur sehingga pagi keesokan hari?*

A: *Ya.*

Q: *Jadi, sekarang keterangan awak bahawa awak tidak ingat dan terus tidur?*

A: *Ya.*

Q: *Pada malam 26.9.2010 hingga esok hari tidak pergi ke mana-mana?*

A: *Ya.*

Q: *Cadangkan, apa-apa yang kamu kata tentang Rahim, kematian Mapillai, dalam keterangan yang terdahulu adalah tidak benar dan satu penipuan?*

A: *Sekarang saya tidak ingat. Kalau dulu saya boleh ingat. Kalau tanya sekarang saya tidak ingat.*

Q: *Cadangan saya semua itu tidak benar?*

A: *Semuanya berlaku. Sekarang saya tidak ingat. Anak saya sakit jantung dan isteri lepas bedah. Fikiran saya ke situ.*

A Q: Tadi awak kata awak minum Carlsberg pada hari itu, mabuk dan terus tidur?

A: Ya.

Q: Setuju malam itu awak memang mabuk?

B A: Saya tidak mabuk sangat.

Q: *Kamu ingat ada pergi ke rumah Rahim pada malam itu?*

A: *Sudah lupa, sudah 2 tahun lebih. Tidak ingat apa-apa pun.*

C Q: *Ada ingat pada malam itu awak minum dengan Rahim di rumah KTMnya?*

A: *Tidak ingat* (at pp 44–47, appeal record, Vol 1). (Emphasis added.)

D **[19]** The jarring inconsistencies between SP6's answers during his examination-in-chief and his answers during the cross-examination have been emphasised and underscored above. The answers varied between 'Tidak tahu', 'Tidak ingat', 'Sudah lupa', and 'Sekarang saya tidak ingat', 'Kalau dulu saya boleh ingat', 'Kalau tanya sekarang saya tidak ingat'.

E *SP6's re-examination*

[20] There were attempts by the deputy public prosecutor ('the DPP') to repair the answers during re-examination. See the following exchange:

F Q: Tentang tarikh 25/26.9.2010, awak tidak ingat apa yang berlaku?

A: Ya. Hari ini tidak ingat.

Q: *Dulu, ada bagi tahu Mahkamah, awak ada minum dengan Rahim dan Rahim kata mahu pukul Mapillai?*

G A: *Sekarang tidak ingat, dulu ya.*

Q: Pada 26.9.2010, kamu ada beri keterangan, mandi, beli beras, minum Carlsberg, balik, pergi ke rumah Rahim dan Mapillai ada, kamu ada cerita yang Mapillai dibunuh?

H A: *Ya. Saya ada cerita seperti dalam perbicaraan dahulu. Semuanya berlaku saya tidak ingat sebab sudah 2 tahun. Saya dapat ingat kembali setelah dibaca semula oleh puan tadi.*

Q: *Berkenaan cerita Rahim bunuh Mapillai, adakah benar atau direka?*

I A: *Memang benar.*

Q: *Peguam tanya — cadangkan kamu tidak tahu siapa bunuh Mapillai?*

A: *Saya sudah lupa.*

Q: *Cuba ingat dari keterangan tadi?*

A: *Rahim yang bunuh Mapillai ...* (at pp 50–51, appeal record, Vol 1). (Emphasis added.)

The alleged corroborative evidence

[21] Aside from the evidence of SP6, the prosecution relied on the scientific evidence from the post-mortem (through the evidence of SP14) and DNA evidence through SP9 (Dr Seah Lay Hong from the Chemistry Department). The DNA evidence proved that traces of blood from the KTM house occupied by the appellant matched the DNA profile of the deceased. The DNA profile from the scene of the crime, however, included a DNA profile of an 'unknown contributory'.

[22] The prosecution further relied on the evidence of discovery of the axe and the knife from a location (the well) shown by the appellant, and admitted under s 27 of the Evidence Act 1950 and on the basis of the appellant's recorded statement — 'Saya telah buangkan kapak dan pisau yang digunakan itu dalam telaga di tepi rumah saya di Kg. Asli Tebong, dan saya boleh tunjuk tempat buang barang-barang kapak dan pisau itu ...'.

[23] To establish motive, the prosecution relied on the evidence of 'SP15' (Periamalay a/l Muthusamy, and three s 112 of the CPC statements of Mathalai (P68), Pitchaimuthu a/l Karuppiah (P72) and Selvaraj a/l Somu (P81) who were Indian nationals who could not be traced and thus the High Court allowed these statements to be admitted under s 32 of the Evidence Act 1950. These s 112 statements were used to establish that the appellant had a grudge against the deceased since it was allegedly the deceased who had caused the appellant to be expelled from the house and toddy shop where he had stayed and worked for more than ten years.

[24] Counsel for the appellant had argued that SP6 was an accomplice and therefore his evidence had to be corroborated by other independent evidence.

DECISION AT CLOSE OF THE PROSECUTION'S CASE

[25] At the close of the prosecution case, the learned High Court judge found there was a prima facie case to answer and called upon the appellant/accused to enter on his defence. In so deciding, the learned judge referred to the two leading cases of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, and purported to subject the evidence to a maximum evaluation: 'Dengan ketetapan di atas, saya kini membuat penilaian maksimum untuk menentukan sama ada satu kes prima facie telah berjaya dibuktikan oleh pendakwaan'.

[26] The learned judge was satisfied that the case fell within the scope of s 300(c) of the Penal Code, ie causing death by an act 'done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.' Referring to the post-mortem evidence, injuries 1 and 3 in the report indicated these were sufficient to have caused the death, although acknowledging that it was difficult to confirm in relation to the other injuries in view of the stage of decomposition of the body. As for the person who caused the death, the learned judge was satisfied that SP6 was truthful in his evidence and discounted the inconsistencies in his cross-examination, and found further that this witness could not be regarded as an accomplice, and the assistance he rendered to the appellant on the disposal of the body and the non-reporting of the murder, were acts done under threat of force. In any event, even if SP6 were to be regarded as an accomplice in the sense of being an 'accessory after the fact', there was sufficient independent corroborative evidence by way of the DNA evidence, the discovery of the murder weapons under s 27 of the Evidence Act 1950, and the s 112 statements by the three Indian nationals which proved the motive behind the killing. The inconsistencies in SP6 answers in cross-examination were described as 'sesuatu perkara biasa yang tidak memudaratkan kredibiliti SP6'.

[27] We provide below some relevant excerpts from the judgment in relation to the finding of a prima facie case to answer:

> Setelah mempertimbangkan penghujahan kedua-dua pihak saya bersetuju dengan penghujahan TPR mengenai isu ini. Saya berpendapat SP6 bukan seorang rakan sejenayah kerana dia tidak tahu menahu tentang niat ataupun perancangan tertuduh untuk membunuh si mati. Dia juga tidak mengetahui bahawa pada malam itu Tertuduh telah menjemput si mati sekali untuk minum bersama mereka ...
>
> Penglibatannya dalam mengangkat dan membuang mayat si mati ke dalam kolam di belakang rumah Tertuduh serta membasuh rumah tersebut untuk menghilangkan semua kesan dan keterangan pembunuhan itu adalah atas arahan, desakan, dan ugutan Tertuduh ...
>
> Bagaimana pun jika SP6 hendak dikatakan sebagai rakan sejenayah sekalipun, ie sebagai rakan sejenayah selepas kejadian (accessory after the fact), dan walaupun adanya peruntukan Seksyen 133 Akta Keterangan 1950, saya amat menyedari akan bahayanya menerima keterangan SP6 tanpa sokongan. Di sini saya mempercayai keterangan SP6 sebagai credible. Selain daripada itu, saya juga mendapati adanya keterangan bebas yang lain untuk menyokong keterangan bebas yang lain untuk menyokong keterangan SP6 terutamanya keterangan daripada SP3, SP9, SP17, SP20 serta keterangan yang dikemukakan di bawah s 27, dan s 32, Akta Keterangan 1950.
>
> Peguam juga cuba mengenepikan keterangan SP6 atas alasan adanya percanggahan dan pertentangan dalam keterangannya terutamanya kegagalan SP6 untuk mengingati kebanyakan peristiwa semasa diperiksa balas. Dalam hal ini harus

dicatatkan SP6 telah memberi keterangan dalam dua lingkungan masa iaitu dalam perbicaraan pada 3.11.2011 dan kemudiannya dalam sambung bicara pada 8 October 2012, ie dalam jarak masa hampir setahun. Semasa SP6 diperiksa balas pada 8 October 2012, SP6 diperhatikan dalam keadaan yang tidak tenteram dan terus menjawab sama ada tidak ingat atau bersahaja...

Diperhatikan di perbicaraan dahulu SP6 telah memberi keterangan yang agak komprehensif namun setelah satu tahun dan dalam keadaan kesihatan anak dan isterinya yang boleh dikira sebagai serius, dan sebagai seorang bapa dan suami yang munasabah, kecelaruannya bukan bermakna dia bercakap bohong atau menjadikannya seorang saksi yang sudah hilang kredibilitinya. Namun dalam ketenangan yang diperolehinya, walaupun seketika, semasa diperiksa semula, SP6 telah menyatakan bahawa keterangannya tentang Tertuduh dan simati dan bahawa Tertuduh yang membunuh si mati sememangnya benar dan bukan rekaan. Selain daripada itu, saya berpendapat kalau adapun percanggahan dalam keterangan SP6 is merupakan sesuatu yang biasa dan tidak memudaratkan kredibiliti SP6 ... (pp 22–25, appeal record, Vol 1).

CASE FOR THE DEFENCE

[28] The appellant narrated how he initially worked in the toddy shop which was initially owned by SP15 (Pariamalay). He worked with SP15 for about six years up to the time when the shop was taken over by Misai. He worked for Misai as a delivery man, coconut picker and a gardener for about five months until he was asked to leave the shop. At that time, Misai had employed three other workers — the deceased, Patchaimuthu and Karuppiah.

[29] According to the appellant, he had a very close relationship with the deceased, and had no problems with him. However, his relationship with Misai was not good, since Misai would ask him cut trees in a jungle reserve illegally to build a fence. The appellant then testified that a problem arose between him and Misai over the increases in the electricity and water charges at the toddy shop. When Misai went back to India, Pitchaimuthu had released water into the fish pond built by Misai. The appellant had also subscribed to Astro TV which the workers and the customers would watch. It was the appellant's case that arising from this understanding, Misai had asked him to leave the shop where he had been staying, leading him to rent the KTM quarters a short distance away. The appellant testified that it was not the deceased who complained to Misai but Patchaimuthu. He stopped working for Misai at that time. He then worked on his own, planting vegetables in the area of the KTM quarters, and selling these. He employed SP6 to assist him, paying him RM20–30 each time to clean the vegetable plot and extracting the chilli seeds. SP6 was then unemployed and the appellant had known him for a long time. SP6 would work at the appellant's house until 5pm in the evening.

[30] On 26 September 2010, the appellant explained that he had gone fishing in the evening. When he returned to the house at about 7.30pm, SP6 and the deceased were already there and drinking alcohol. According to the appellant, he did not drink with them. He questioned SP6 why he was drinking so early in the evening, to which SP6 replied he was drinking whilst cleaning chilli.

[31] Since the house did not have clean water, and he wanted to cook rice, the appellant went to the toddy shop to obtain some water in a basin. When he returned to the house, he saw the deceased lying on the floor, and was told by SP6: 'Kamu diam sahaja. Pergaduhan berlaku antara kami berdua'. It was SP6 who asked him to carry the deceased, and if he did not, SP6 would stab him with the knife SP6 was carrying. SP6 asked him to place the body on SP6's shoulder and SP6 carried the body out of the house. The appellant did not know where SP6 took the body. SP6 returned 15–20 minutes thereafter and cleaned the house. SP6 told him not to report the incident to anyone else since the incident happened while he (SP6) was drunk.

[32] The appellant made known that SP6 had a 'problem' with the deceased since the deceased had previously refused to sell toddy to SP6 on credit because SP6 was always indebted to the toddy shop. When questioned on the discovery of the axe and knife as resulting from what he had told the police, the appellant denied knowing how the axe and the knife came to be in the well, and the photograph introduced in evidence showing him pointing to the weapons and the well was explained away by him saying: 'Polis suruh saya tunjukkan kedua-dua jari pada perigi itu, saya pun tunjuk', and 'Itu gambar polis membawa pisau dari perigi dan mereka suruh saya tunjuk jari pada pisau dan mereka pun ambil gambar'. As stated earlier in this judgment, the appellant was the only witness for the defence.

DECISION OF THE HIGH COURT AT THE CONCLUSION OF TRIAL

[33] In summary, the learned judge disbelieved the appellant's evidence and concluded it to be merely bare denials, an afterthought and difficult to believe. Further, the defence had not put and challenged SP6 directly that it was SP6 who killed the deceased. The appellant was found not to have raised a reasonable doubt in the prosecution's case, and thereby the learned judge found the appellant guilty as charged and sentenced him to the mandatory sentence of death.

[34] The learned judge applying *Public Prosecutor v Mohd Radzi bin Abu Bakar*, said:

Selaras dengan peruntukan S 182A KPJ, Mahkamah ini perlu mempertimbangkan keseluruhan keterangan dan menentukan sama ada pendakwaan telah berjaya membuktikan kesnya tanpa keraguan yang munasabah. Bagi tujuan tersebut, kes pembelaan perlulah dipertimbangkan dan dinilaikan semula dengan keterangan pendakwaan sama ada pembelaan telah berjaya menimbulkan keraguan ke atas kes pendakwaan ...

Bagi tujuan tersebut, apakah kes Pembelaan ...? Kes pembelaan telah bertemakan penafian semata-mata ...

Saya telah mempertimbangkan keterangan Tertuduh di atas dan menilaikannya dengan keterangan saksi-saksi pendakwaan serta penghujahan pihak-pihak, saya dapati keterangan Tertuduh tidak munasabah dan tidak boleh dipercayai. Terdapat percanggahan dalam keterangannya sendiri terutamanya berkaitan dengan bila SP6 dan si mati berada dirumahnya. Adakah sebelum atau selepas 7.30pm? ... Saya juga mendapati pembelaan yang berkait rapat dengan SP6 tidak langsung dikemukakan atau dicabar ke atas SP6. Tidak dikatakan kepada SP6 bahawa:

> Dia tidak bekerja;
>
> Dia bekerja atau mengambil upah dengan Tertuduh;
>
> SP6 yang memukul dan mencederakan atau mengakibatkan kematian si mati (walaupun secara am kepada SP20);
>
> SP6 yang mengarahkan Tertuduh mengangkat mayat si mati ke bahu SP6;
>
> Tertuduh tidak pernah minum bersama SP6;
>
> SP6 mengugut Tertuduh supaya jangan memberitahu sesiapapun tentang perkara ini;
>
> SP6 tidak dipersoalkan tentang kemabukannya dan menyebabkan kematian si mati.

...

Dibandingkan dengan keterangan SP6, saya lebih mempercayai keterangan SP6 walaupun di satu peringkat keterangan SP6 semasa diperiksa balas dikatakan bercanggah dan tidak memberangsangkan terutama dengan jawapan 'tidak ingatnya' ...

Jika ada pun kelompangan dalam keterangan SP6, kedudukan itu telah dapat ditutupkan dengan keterangan sokongan yang banyak dalam kes ini sama ada melalui keterangan saintifik, perubatan dan keterangan lain yang dikemukakan. Dari sudut ini, saya menerima keterangan SP6 sepertimana yang telah diputuskan secara penilaian maksimum di akhir kes pendakwaan. Dan, setelah dinilaikan

dengan keterangan yang dikemukakan oleh Tertuduh, yang saya tidak percaya, keterangan SP6 telah dimantapkan lagi ... (at pp 40–45, appeal record, Vol 1).

THE SUBMISSIONS IN THE APPEAL

The appellant's submission

[35] The appellant put forth 23 grounds in his petition of appeal, but in the course of the appeal counsel for the appellant emphasised three main grounds which encapsulated most of the detailed grounds. These main grounds were advanced as (1) the reliability of SP6's evidence, (2) the evidence of SP6 on the issue of duress and/or his position as particeps criminis, and (3) the evidence relating to the s 112 statements (exhs P68, P72 and P81) of Mathalai, Pitchaimuthu a/l Karuppiah and Selvaraj a/l Somu, the three Indian nationals who could not be traced, and whether the learned judge had directed himself properly on the weight to be attached to these evidence.

[36] On the first issue, it was argued that the crux of the prosecution's case was based on circumstantial and direct evidence, with the direct evidence being based on SP6's evidence alone. Without the direct evidence, the circumstantial evidence was insufficient to convict the accused since the evidence could not have led to the irresistible conclusion that the accused committed the crime.

[37] SP6 was at the scene of the crime. He helped in disposing of the body. He returned to the house to assist in cleaning up the bloodstains. On his own evidence, he then fetched water from the well and lent his shirt and his clothes to wipe the bloodstains, after which he placed these in a plastic bag and threw them into a drain near the railway line. He was even paid RM100 for his effort and given the deceased's hand phone.

[38] He was the first person to be arrested on suspicion of murder. The appellant was arrested on the same day for suspected housebreaking and in the process was then arrested for the suspected murder.

[39] During the cross-examination, SP6 was evasive and inconsistent in his answers, but in re-examination he seemed to remember again on what transpired on the day of the crime, as he explained it — 'Saya dapat ingat kembali setelah dibaca semula oleh puan (reference to TPR) tadi'.

[40] Although SP6 was bound by law to report the crime under s 13 of the CPC, he failed to lodge any police report, and effectively kept quite for 12 days until he was arrested.

[41] The DNA evidence showed SP6's DNA on the items of clothing, but none of the appellant.

[42] He even lied to SP11 (Jayasangkar a/l Subramaniam, to whom he gave the hand phone) as to how he came by the hand phone: 'Dia beritahu terjumpa di bawah dan tidak tahu menggunakanya' (p 144, appeal record, Vol 1).

[43] The defence submission impressed upon us that SP6 was not a witness of truth, and the learned judge had failed to critically evaluate his credibility on a maximum evaluation basis. Where a witness was not a truthful witness, it was argued, the court could not accept part of his evidence and reject the rest, since the principle was that where a witness for the prosecution led two sets of evidence which were contradictory with each other on a fundamental matter, the inevitable conclusion was the court would be left with no trustworthy evidence upon which a conviction could be based (*Public Prosecutor v Rajandiran a/l Kadirveil* [2002] 7 MLJ 77). In such a situation, the accused would be entitled to the benefit of a reasonable doubt in his favour (*Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183; *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322).

[44] As regards the second issue on whether SP6 was an accomplice and whether conversely he was not because he was acting under duress, the evidence disclosed SP6 was an accessory after the fact and therefore an accomplice in law (*Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593; [2005] 1 CLJ 11). Referring to s 94 which deals with duress or 'threats', counsel for the appellant cited *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246 and the statement of law therein, stating:

> It was settled law since *Tan Seng Ann v Public Prosecutor* [1949] 1 MLJ 87 that a plea of duress under s 94 of the Penal Code ... to be successful, must be imminent, extreme and persistent at the time of commission of the offence ...

[45] On the facts, the alleged threat was not imminent, extreme or persistent. There was an opportunity to escape. The learned judge had failed to consider this issue properly. As counsel stated it, '... it would be observed that the trial court failed to consider... whether there was opportunity which was reasonably open to SP6, to render the death threat to himself or his family ineffective, by a safe avenue of escape or by seeking police protection'.

[46] As regards the s 112 statements, these were damaging statements admitted under s 32(1)(i) of the Evidence Act 1950 as basically statements of persons who could not be found in relation to statements 'made in the course of, or for the purposes of, an investigation or inquiry into an offence.' Since the statements, essentially hearsay in character, went to the character of the accused

and were used to provide the motive for the murder, the trial judge had failed to consider the weight that should attach to the statements, and this failure constituted a fundamental misdirection.

[47] Turning to the s 27 of the Evidence Act 1950 that led to the discovery of the axe and the knife in the well, it merely indicated that the accused took the police to the location or that he threw the axe and the knife that were used into the well. This evidence did not directly prove that the accused/appellant committed the murder on the basis of the admissible evidence.

[48] It was submitted for the appellant that on the evidence before the court at the conclusion of the trial, either SP6 or the appellant, or both, could have committed the crime.

[49] Counsel was candid enough to concede that no question was put directly to SP6 in the cross-examination that he committed the crime, but that same question was put to another witness, SP22 (ASP T Gunasegaran, the investigation officer) who disagreed with the suggestion.

[50] On the evidence before the trial court, counsel submitted that the conviction was unsafe. The trial judge had not done a correct evaluation of the evidence, and no elimination process was done to exclude SP6 as the person who committed the crime. In view of the unsatisfactory nature of SP6's evidence as the only direct evidence, and the version of the facts given by the accused/appellant himself, there were gaps in the prosecution case.

The prosecution's submissions

[51] In summary, the DPP submitted the trial judge was correct in not finding that SP6 was an accomplice since SP6 was acting under a threat which was continuing in nature. Further the judge had directed his mind to the necessary caution that corroboration was required, and directed our attention to p 26 of the appeal record, Vol 1, and the reference to the following passage in the judgment:

> Bagaimanapun jika SP6 hendak dikatakan sebagai rakan sejenayah sekalipun, ie sebagai rakan sejenayah selepas kejadian (accessory after the fact), dan walaupun adanya peruntukan Seksyen 133 Akta Keterangan 1950, saya amat menyedari akan bahayanya menerima keterangan SP6 tanpa sokongan. Di sini saya mempercayai keterangan SP6 sebagai credible ...

[52] The trial judge was satisfied the post-mortem report, the DNA report and the s 27 discovery of the murder weapons were corroborative evidence to lend credibility to the eyewitness account by SP6.

[53] As to the submission that SP6 was the person who committed the crime, the DPP underscored the fact that this was not put directly to SP6 in cross-examination.

[54] Adverting to the s 112 statements, the DPP impressed upon us that 'SP20' (ASP Zabidi bin Kadir) had explained how the police had undertaken reasonable steps to locate the three Indian nationals, by tracing their movements to Kapar, Kelang and Sungai Petani, as well as checking and confirming with the Immigration Department whether they had left Malaysia. Pitchaimuthu had left Malaysia on 7 August 2011, but there was no record on this for Selvaraj and Mathalai, who were believed to have stayed on illegally in Malaysia since their visit passes had expired. These attempts satisfied the stringent requirements of s 32 of the Evidence Act 1950. In any event, it was further argued, the trial judge did not rely fundamentally on these s 112 statements.

THIS COURT'S ANALYSIS AND CONCLUSIONS

[55] Given the gravity of the offence and the death sentence, the paramount issue that had to be decided was whether on the evidence before the trial court, there had been a proper judicial evaluation of the evidence by the trial judge in a situation where the only direct evidence was the testimony of SP6, an alleged eyewitness, who proved to be inconsistent and in fact contradicted himself on the fundamental aspects of the evidence linking the appellant with the commission of the crime. The salient part of his cross-examination have been quoted extensively in this judgment, but it bears emphasis that this witness could not even confirm in cross-examination whether he was with the appellant and the deceased on 26 September 2010, ie the date of the incident. To recapitulate, these were his ambivalent answers:

Q: Pada malam 25.9.2010, lebih kurang 7.30 malam, adakah awak minum pada hari itu?

A: *Tidak tahu. Saya tidak ingat sama ada saya ada minum.*

Q: Cadangkan pada 25.9.2010, kamu dan Rahim ada bersama-sama minum pada hari itu?

A: Saya tidak ingat.

Q: *Pada 26.9.2010. awak dimana?*

A: *Saya tidak tahu.*

Q: Awak ada pergi kerja pada hari itu?

A: *Saya tidak tahu.*

...

Q: *Pada malam 26.9.2010, lepas di kedai dan minum Carlsberg awak di mana?*

A: *Saya pulang ke rumah. Saya pulang ke rumah isteri saya di Kampung Asahan, masa tidak ingat.*

Q: *Selepas balik ke rumah, ada keluar ke mana atau terus tidur?*

A: *Sebab saya mamai, saya terus tidur.*

Q: *Tidur sehingga pagi keesokan hari?*

A: *Ya.*

Q: *Jadi, sekarang keterangan awak bahawa awak tidak ingat dan terus tidur?*

A: *Ya.*

Q: *Pada malam 26.9.2010 hingga esok hari tidak pergi ke mana-mana?*

A: *Ya.*

Q: *Cadangkan, apa-apa yang kamu kata tentang Rahim, kematian Mapillai, dalam keterangan vang terdahulu adalah tidak benar dan satu penipuan?*

A: *Sekarang saya tidak ingat. Kalau dulu saya boleh ingat. Kalau tanya sekarang saya tidak ingat.* (Emphasis added.)

[56] At the close of the prosecution case, the learned trial judge was satisfied that on a maximum evaluation of the evidence, the prosecution had proven a prima facie case against the appellant under s 180 of the CPC, and explained away the contradictions and inconsistencies by reference to this witness's then state of mind (being pre-occupied with the health of his wife and child) and the lapse of time that had transpired between the date of the examination-in-chief and the date of the cross-examination, which was a lapse of about a year. With respect, we could not agree with this assessment. A person who was portrayed as being a witness to a hideous crime where the victim was hit with an axe four times on the head, stabbed twice on the neck, dragged to the kitchen area and hit again on his hands with the axe, could not have forgotten the gruesome facts that easily, even after a year after his examination-in-chief, and even when under some mental strain worrying about the health of his wife and child. This same witness, allegedly under duress, and on his own evidence, helped the accused to carry the body which was thrown into the pond, returned to the house and fetched water for the accused to clean the bloodstains for which he even lent his clothes to wipe away the bloodstains, subsequently methodically disposing the items of clothing into a drain nearby, and thereafter accepted RM100 from the appellant and a hand phone belonging to the deceased. It was highly improbable and in defiance of logic for the witness to have completely forgotten these events.

[57] The learned judge was also swayed by the corroborative evidence, but these, in our view, did not directly and irresistibly link the evidence with the accused. The post-mortem merely stated medically the cause of death. It did not prove irresistibly that the accused cause the wounds which led to the death. The DNA evidence likewise did not show the appellant as a contributory. On the other hand, there was evidence of SP6's DNA on the seized items. The presence of the 'unknown contributory', however, was inconsequential, since on the evidence the house had been occupied by SP3, the previous owner and friend of the appellant.

[58] The s 27 of the Evidence Act 1950 too could not be regarded on its own as irresistibly leading to proof that these weapons were used by the appellant to murder the deceased. It was not coupled with any admissible evidence of a confession as to the killing.

[59] The s 112 statements too constituted weak evidence, quite apart from being hearsay held to be admissible under s 32 of the Evidence Act 1950. It denied the opportunity for the appellant to test the veracity of these statements providing motive for the murder by cross-examining these persons. On this we agreed with the appellant's position that the trial judge had failed to direct his mind to the weight to be attached to this particular unsatisfactory evidence. This failure by itself could lead to a miscarriage of justice. An accused person is entitled to a fair trial and where an accused loses a chance of acquittal which is fairly open to him because of a substantial miscarriage of justice occasioned by a misdirection by the trial judge, the conviction becomes unsafe.

[60] All said, the strongest or the weakest evidence remained with the direct evidence of SP6. In this connection, we agreed with the submission by appellant's counsel that the court should accept the existence of a reasonable doubt in the accused's favour where a witness for the prosecution led two sets of evidence which were contradictory with each other on a fundamental matter, the inevitable conclusion was the court would be left with no trustworthy evidence upon which a conviction could be based.

[61] With respect, in our view, the trial judge should have discharged and acquitted the accused even at the close of the prosecution case, since on a maximum evaluation of the evidence, no prima facie case could be regarded as established. It was incumbent on the trial judge to assess on a maximum evaluation basis the credibility of SP6, which was unfortunately not done arising from an improper judicial evaluation and appreciation of the totality of the witness's evidence.

[62] As for the decision at the end of the trial, we found a serious misdirection on the part of the trial judge when the decision was essentially

based on the issue of the believability of the appellant's evidence as against the prosecution evidence. The law on this has been well-established: it is not a question of whether a trial judge believes the story of the accused is truthful or not, but whether, at the end of the trial, the accused has succeeded in raising a reasonable doubt in the prosecution case. In our view, the failure of appellant's counsel to put a direct question to SP6 that he (SP6) was the person who caused the death of Mapillai, the deceased, was just a factor to be considered, and in a criminal trial could not be determinative. The general rule that if the opposing side's version of the facts is not challenged on a material matter, then it is deemed admitted, fits more easily in a civil case, not a criminal trial, where the ultimate question is whether a reasonable doubt has been raised in the prosecution case. In any event, the question was put directly through another witness, ie SP22.

[63] On the totality of the evidence and the law, and after considering submissions of counsel and the DPP, we found the conviction by the High Court in this appeal unsafe. There was a miscarriage of justice which required us to set aside the conviction and the sentence of death of the High Court. The appellant was thereby acquitted and discharged.

Appeal allowed, conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar